Tenaga Nasional Bhd v Evergrowth Aquaculture Sdn Bhd

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCvC)(W)-284–01 OF 2013

B

ZAHARAH IBRAHIM, ANANTHAM KASINATHER AND DAVID WONG JJCA

25 AUGUST 2016

C

Public utilities — Electricity — Consumption and usage — Under-recording of actual consumption — Allegation of meter tampering — Whether proved — Plaintiff's officers entered into defendant's premises and conducted inspection of premises on pre-dawn — Whether plaintiff's officers entered into premises at reasonable time — Electricity Supply Act 1990

D

The appellant ('the plaintiff') was a service provider under the Electricity Supply Act 1990 ('Act 447'). It supplied electricity to the respondent's premises ('the defendant's premises'). At about 5am, the plaintiff's officers entered the defendant's premises and conducted an inspection of the defendant's premises and claimed to have discovered tampering of the meter. A police report was lodged and the plaintiff claimed that as a result of the meter tampering, the actual usage of electricity at the defendant's premises could not be recorded. The plaintiff demanded for the shortfall ('back billing') as well as the expenses incurred in conducting the pre-dawn operation. When the defendant failed to pay the amount claimed, the plaintiff initiated this suit at the High Court claiming the same. The defendant filed a counterclaim claiming that the plaintiff's servants had trespassed onto the defendant's premises and had assaulted the defendant's workers causing injuries to them such that one of them had damaged his hearing. The learned judicial commissioner ('JC') allowed the plaintiff's claim while the defendant's counterclaim was dismissed. The plaintiff was aggrieved by the orders of the High Court that damages be allowed for the period between 1 June–26 August 2010 only and for those damages to be assessed. It filed an appeal to this Court against those orders. The defendant was aggrieved by the High Court decision dismissing its counterclaim and the award of damages and aggravated damages and cross-appealed.

E

F

G

H

Held, allowing defendant's cross-appeal in part; setting aside order of High Court on general damages and aggravated damages; dismissing plaintiff's appeal; and dismissing defendant's cross-appeal against dismissal of counterclaim:

I

(1) Rule 8 of the Rules of the Court of Appeal 1994 allowed only a variation of an order made by the High Court. As the defendant did not file an

appeal against the dismissal of its counterclaim, the cross-appeal on the counterclaim was contrary to the provisions of the rule and therefore that part of the cross-appeal was dismissed (see para 34).

(2) There was no sound basis used for the back billing. It was claimed that the defendant could 'control' electricity usage, but the plaintiff's witness ('PW2') only made a bare denial when asked if the difference in the readings could be the result of less paddles being used. PW2 admitted that they did not check the number of paddles being used and had no authority to inspect electrical appliances used at the premises. When the business activity of a consumer involves possibilities of different levels of electricity usage at different periods of time, it would be gross injustice to automatically assume that any drop in electricity usage was the result of electricity 'theft' (see paras 47 & 49).

(3) The plaintiff was a licensee under Act 447. It was neither a regulator not an enforcer. Its relationship with its customers was based on contract. Apart from the contractual rights, it was given permission (not power) to do certain acts consistent with its role as an electricity supply provider, such as the ability, under reg 7 to enter premises to which supply is given by it, 'at all reasonable times'. Entry into a consumer's premises in the wee hours of the morning when no operational activity was going on was clearly not entry at a reasonable time. PW2 in fact used the term 'ambush' to describe the pre-dawn inspection. An 'ambush' is the domain of enforcement officers — which PW2 and his men were not. This was not a factory where operations might be conducted throughout the day and at night (see paras 55 & 57).

(4) Given the clear provisions of Act 447 on powers of enforcement and persons who can exercise such powers of enforcement, reg 7, being subsidiary legislation, could not possibly be interpreted to allow officers authorised by a licensee to conduct, as stated by PW2, a pre-dawn 'ambush' of the defendant's premises (see para 62).

[Bahasa Malaysia summary

Perayu ('plaintif') adalah pembekal perkhidmatan di bawah Akta Bekalan Elektrik 1990 ('Akta 447'). Ia membekalkan elektrik kepada premis responden ('premis defendan'). Lebih kurang pukul 5 pagi, pegawai-pegawai plaintif telah memasuki premis defendan dan melakukan pemeriksaan ke atas premis defendan dan mendakwa telah mendapati meter diusik. Laporan polis telah dibuat dan plaintif mendakwa bahawa akibat meter itu diusik, penggunaan sebenar elektrik di premis defendan tidak boleh direkodkan. Plaintif menuntut kurangan ('bil kebelakang') dan juga perbelanjaan yang ditanggung dalam menjalankan operasi awal pagi. Apabila defendan gagal membayar jumlah yang dituntut, plaintif telah memulakan guaman ini di Mahkamah Tinggi menuntut yang sama. Defendan telah memfailkan tuntutan balas mendakwa

bahawa pekerja-pekerja plaintif telah menceroboh ke premis defendan dan menyerang pekerja-pekerja defendan sehingga menyebabkan kecederaan kepada mereka di mana salah seorang daripada mereka telah rosak pendengarannya. Pesuruhjaya kehakiman yang bijaksana ('PK') membenarkan tuntutan plaintif manakala tuntutan balas defendan telah ditolak. Plaintif terkilan oleh perintah-perintah Mahkamah Tinggi yang membenarkan ganti rugi untuk tempoh antara 1 Jun–26 Ogos 2010 hanya dan agar ganti rugi tersebut ditaksirkan. Ia telah memfailkan rayuan kepada mahkamah ini terhadap perintah-perintah tersebut. Defendan terkilan oleh keputusan Mahkamah Tinggi kerana menolak tuntutan balasnya dan award ganti rugi dan ganti rugi tambahan dan telah merayu balas.

Diputuskan, membenarkan sebahagian daripada rayuan balas defendan; mengetepikan perintah Mahkamah Tinggi berhubung ganti rugi am dan ganti rugi tambahan; menolak rayuan plaintif; dan menolak rayuan balas defendan terhadap penolakan tuntutan balas:

(1) Kaedah 8 Kaedah-Kaedah Mahkamah Rayuan 1994 membenarkan hanya perubahan perintah yang dibuat oleh Mahkamah Tinggi. Oleh kerana defendan tidak memfailkan rayuan terhadap penolakan tuntutan balasnya, rayuan balas berhubung tuntutan balas itu bertentangan dengan peruntaukan-peruntukan kaedah itu dan oleh itu bahagian rayuan balas tersebut ditolak (lihat perenggan 34).

(2) Tiada asas kukuh yang digunakan untuk bil kebelakangan. Ia didakwa bahawa defendan boleh 'control' penggunaan elektrik, tetapi saksi plaintif ('PW2') hanya membuat penafian kosong apabila ditanya jika perbezaan dalam bacaan mungkin disebabkan kurang bilah digunakan. PW2 mengakui bahawa mereka tidak memeriksa jumlah bilah yang digunakan dan tidak mempunyai kuasa untuk memeriksa peralatan elektrik yang digunakan di premis itu. Apabila aktiviti perniagaan pengguna melibatkan kemungkinan tahap berbeza penggunaan elektrik pada tempoh masa yang berbeza, ia adalah tidak adil untuk terus membuat andaian bahawa apa-apa penurunan dalam penggunaan elektrik adalah akibat 'theft' elektrik (lihat perenggan 47 & 49).

(3) Plaintif adalah pemegang lesen di bawah Akta 447. Ia bukan pengawalselia atau penguatkuasa. Hubungannya dengan pelanggannya adalah berdasarkan kontrak. Selain daripada hak kontraktual, ia diberikan kebenaran (bukan kuasa) untuk melakukan perbuatan tertentu yang konsisten dengan peranannya sebagai pembekal elektrik, sepertimana keupayaan, di bawah peraturan 7 untuk memasuki premis di mana bekalan diberikan olehnya, 'at all reasonable times'. Kemasukan dalam premis pengguna pada awal pagi apabila tiada aktiviti operasi dijalankan jelas bukan kemasukan pada masa yang munasabah. Bahkan PW2 menggunakan istilah 'ambush' untuk menggambarkan

pemeriksaan awal pagi itu. Suatu 'ambush' merupakan domain pegawai-pegawai penguatkuasa — yang mana PW2 dan orang-orangnya bukan begitu. Ini bukan kilang yang mana operasi mungkin dijalankan sepanjang hari (lihat perenggan 55 & 57).

(4) Berdasarkan peruntukan jelas Akta 447 berhubung kuasa penguatkuasaan dan orang yang boleh menggunakan kuasa sedemikian, peraturan 7, iaitu perundangan subsidiari, tidak mungkin boleh ditafsirkan bagi membenarkan pegawai-pegawai yang diberi kuasa oleh pemegang lesen untuk menjalankan, sepertimana dinyatakan oleh PW2, 'ambush' awal pagi di premis defendan (lihat perenggan 62).]

Notes

For cases on electricity in general, see 10(2) *Mallal's Digest* (5th Ed, 2015) paras 2342–2363.

Cases referred to

Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd [2007] 1 MLJ 217; [2006] 4 CLJ 892, CA (refd)

Legislation referred to

Electricity Supply Act 1990 ss 4A, 5(2), 36(7), 37, 37(6), 38, 38(3), (4)
Licensee Supply Regulations 1990 reg 7
Rules of the Court of Appeal 1994 r 8

Appeal from: Suit No 22NCVC-250–03 of 2012 (High Court, Kuala Lumpur)

David Mathew (Mohd Nor Mahmud and Hadi Mukhlis with him) (Mohamed Noor, Amran & Yoon) for the appellant.
Jack Yeow (Rahmat Lim & Partners) for the respondent.

Zaharah Ibrahim JCA (delivering judgment of the court):

INTRODUCTION

[1] This was an appeal by the plaintiff against the High Court decision ordering damages for the period from 1 June–28 February 2010 only and for such damages to be assessed.

[2] The defendant in turn cross-appealed seeking to have the order for damages varied by having them set aside.

[3] For ease of reference, in this judgment the parties will be referred to as they were in the High Court.

BACKGROUND FACTS

[4] The plaintiff was a service provider under the Electricity Supply Act 1990 ('Act 447'). It supplied electricity to the premises at No 2 Fasa 8 Mukim Api-api, Kampung Asam Jawa, 47500 Kuala Selangor where the defendant operated a prawn farm ('the defendant's premises').

[5] Before dawn on 26 August 2010 (about 5 o'clock in the morning), the plaintiff's officers entered the defendant's premises and conducted an inspection of the defendant's premises and claimed to have discovered tampering of the meter by the use of a clamp. A police report was lodged.

[6] The plaintiff claimed that as a result of the tampering the meter failed to record the actual usage of electricity at the defendant's premises, and made a demand for the shortfall ('back billing') as well as the expenses incurred in conducting the predawn operation. A legal demand was made by the plaintiff through its solicitors by notice of demand dated 8 November 2011 for the sum of RM1,662,261.26.

[7] The amount claimed by the plaintiff was for alleged loss of revenue from 26 September 2005–26 August 2010 as well as for the expenses incurred in conducting the pre-dawn operation.

[8] When the defendant failed to pay the amount claimed, the plaintiff filed this suit on 27 February 2012.

IN THE HIGH COURT

The claim and counterclaim

[9] In its statement of claim, the plaintiff stated that during its inspection of the meter at the defendant's premises at 5am on 26 August 2010 they found evidence of tampering of the meter and lodged a police report.

[10] The plaintiff claimed that as a result of the tampering the meter could not function properly and failed to record accurately the amount of electricity actually supplied to the defendant's premises and as a result the amount on the electricity bill served on the defendant each month was lower than what it should actually be.

[11] The plaintiff's calculation showed that it had under-billed the defendant. It claimed that inclusive of the costs of the pre-dawn operation conducted by the plaintiff on 26 August 2010 the defendant owed the plaintiff RM1,662,261.26.

[12] The plaintiff claimed the following reliefs:

(a) Jumlah terhutang sebanyak RM 1,662,261.26;

(b) Faedah atas jumlah RM 1,662,261.26 pada kadar 4% setahun dikira dari tarikh penghakiman sehingga penyelesaian sepenuhnya;

(c) Kos atas dasar peguamcara-anakguam;

(d) Kos tindakan ini; dan

(e) Apa-apa relif yang difikirkan patut dan suaimanfaat oleh Mahkamah ini.

[13] The defendant filed a counterclaim claiming that the plaintiff's servants had trespassed onto the defendant's premises and had assaulted the defendant's workers causing injuries to them such that one of them had in fact damaged his hearing. A police report was lodged on the incident.

The evidence

[14] The evidence adduced during trial was that the inspection of the defendant's premises was conducted about *5am* on 26 August 2010 by a team of the plaintiffs officers, including PW1 and PW2, and the plaintiff's auxiliary police personnel.

[15] PW1 and PW2 claimed to have discovered a clamp being affixed to the test terminal block ('TTB') at the electricity meter in the meter room inside the defendant's premises. They then checked the meter and found a discrepancy in the reading of the meter.

[16] Based on that search, calculations were made by PW3 who calculated the amount of the shortfall from 26 September 2005 as there was a sudden drop in electricity usage by the defendant then.

[17] By letter dated 10 January 2011 signed by one Mohd Nazri bin Puteh, the Area Manager (Kuala Selangor) of the plaintiff's distribution division, the plaintiff notified the defendant that the plaintiff had evidence that the meter was not recording the actual usage of electricity at the defendant's premises and the amount of shortfall was RM1,662,261.26. The defendant was given 14 days from the date of the letter to pay the full amount, failing which supply of electricity to the defendant's premises would be disconnected.

[18] By a letter dated 6 May 2011 signed by one Zahrul Effendy bin Shahid, the Assistant Manager of Consumer and Marketing for the area of Kuala Selangor for and on behalf of the Area Manager for Kuala Selangor, the plaintiff made a demand under sub-s 38(3) of Act 447 for the sum of RM1,662,261.26 to be paid within seven days of the date of the letter, failing which supply would

be disconnected. This letter was the plaintiff's written statement under sub-s 38(4) of Act 447 ('written statement'). A

[19] The plaintiff's solicitors subsequently issued a legal notice of demand dated 8 November 2011 demanding the payment of the sum of RM1,662,261.26 within 14 days from the date of the letter, failing which legal proceedings would be instituted. B

[20] The defendant adduced evidence through DW1, who was one of its directors. DW1 denied the tampering of the meter and denied that a clamp was used on the TTB. C

[21] DW1 explained at great length the reasons for the drop in electricity usage in some months. According to him, the prawns were infected with the white spot virus and had to be harvested prematurely. The affected ponds were left fallow and hence the usage of the paddles was reduced. This meant that less electricity was used. He claimed that the defendant had in fact on several occasions invited the plaintiff's representatives to see the fallow ponds but the plaintiff did not visit the prawn farm. D

E

The High Court decision

[22] The learned judicial commissioner found that tampering was proved by the plaintiff, and allowed the plaintiff's claim. The learned judicial commissioner made the following orders (as set out in the grounds of judgment): F

a. that the Plaintiff's claim is allowed and that general damages be assessed for losses sustained by the Plaintiff for the period beginning 1.6.2010 till 26.8.2010; G

b. that the Defendant pay the sum of RM200,000.00 to the Plaintiff as exemplary damages;

c. that interest on the damages be at 4% per annum on the judgement sum from the date of filing of the Writ; H

d. that the Defendant's counterclaim be dismissed; and

e. the costs for the claim and counterclaim be fixed at RM45,000.00.

[23] The plaintiff was aggrieved by the orders of the High Court that damages be allowed for the period between 1 June–26 August 2010 only and for those damages to be assessed. It filed an appeal to this court against those orders. I

[24] The defendant was aggrieved by the High Court decision dismissing its counterclaim and the award of damages and aggravated damages and cross-appealed.

THE APPEAL AND CROSS-APPEAL

[25] During the hearing of the appeal before us, no issue was taken by the plaintiff, either at the first date when the appeal came up for hearing (and adjourned when the plaintiff's counsel claimed to have no knowledge of the cross-appeal), or at the subsequent date when the appeal and cross-appeal were heard, on the procedural propriety of the cross-appeal.

[26] We decided to hear the defendant's submissions on the cross-appeal first before hearing the plaintiff's submissions on the main appeal, as the issue of the correctness of the High Court order on damages was the central issue in the appeal and the cross-appeal.

SUBMISSIONS

[27] It was submitted for the defendant that the order for aggravated damages against the defendant was wrong as it was not pleaded and in any case this was a claim in contract, not tort.

[28] The defendant also submitted that the order for damages to be assessed was also erroneous as there was in fact no tampering and the inspection by the plaintiff was illegally done. The calculation for the loss of revenue was also done contrary to the method published by the plaintiff on its website. Further, the defendant had explained the reasons for the variations in the meter readings of the electricity supplied to the defendant's premises.

[29] The defendant submitted that a substantial part of the plaintiff's claim was barred by limitation.

[30] For the plaintiff, it was submitted that there was tampering as was shown when the reading dropped and when a worker was seen running to remove the clamp.

[31] On the alleged illegal entry, learned counsel for the plaintiff referred to the case of *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* [2007] 1 MLJ 217; [2006] 4 CLJ 892 as authority for his submission that the plaintiff's servants could enter premises under reg 7 of the Licensee Supply Regulations 1990 read with s 38 of Act 447.

[32] On the calculations for the loss of revenue, learned counsel for the plaintiff submitted that the plaintiff was not obliged to use any particular method for the calculation. It was also submitted that the defendant had failed to produce evidence to rebut the prima facie evidence of the unrecorded usage of electricity translated into the amount claimed in written statement.

[33] On the order for aggravated damages, learned counsel for the plaintiff conceded that it was not pleaded, but submitted that the learned judicial commissioner had a discretion to award it.

ANALYSIS

Cross-appeal on the counterclaim

[34]

We were of the considered view that r 8 of the Rules of the Court of Appeal 1994 allowed only a variation of an order made by the High Court. As the defendant did not file an appeal against the dismissal of its counterclaim, we were of the considered view that the cross-appeal on the counterclaim was contrary to the provisions of the rule and we therefore dismissed that part of the crossappeal.

Aggravated damages

[35] Learned counsel for the plaintiff conceded that the plaintiff did not claim for aggravated damages in its statement of claim.

[36] In out considered view, there was no basis for the learned judicial commissioner to award aggravated damages against the defendant. The plaintiff's claim was a claim for pure loss of revenue as a result of the tampering of the meter.

[37] We agreed with the defendant that given the circumstances of the inspection at the defendant's premises, if aggravated damages were at all warranted, it would have been in the defendant's favour.

Loss of revenue — back billing

[38] From the terms of the order of the High Court as set out above, the learned judicial commissioner obviously, in our considered view, accepted the evidence that showed that the only evidence that the meter was tampered with was the evidence of PW1 who claimed to have seen someone running to the meter, and the evidence of PW2 that there was a clamp attached to the TTB. This happened on 26 August 2010.

[39] There was evidence that the meter was inspected on 1 June 2010 and nothing untoward was seen or detected during that inspection. Any tampering could have only occurred after the inspection on 1 June 2010

[40] PW2 and PW3, in particular, attempted to explain that the clamp could be fixed and removed at will without leaving any trace. However, the clear evidence of PW2 was that:

> A: Untuk 1.6.2010, pemeriksaan dilakukan tetapi didapati meter dalam keadaan baiklah. Dan pada procedur biasa jika tidak ada apa masalah pada pepasangan TNB, mereka tidak akan membuat tindakan susulan untuk filing dan pengiraan semula sebab meter yang sedia ada dicheck itu tidak ada masalah.

[41] PW1 was the person who was first at the location of the TTB during the pre-dawn inspection. During PW1's cross-examination, the following exchange was recorded:

Q71:	From the bottom, my Lord. Terdapat itu pelekat ya, pelekat pada TTB di mana terdapat tulisan 26 Ogos 10. Ini yang dipanggil pelekat, ya?
A:	Mm.
Q72:	Apakah fungsi pelekat ini?
A:	Ini adalah sticker keselamatan bagi pihak TNB. Semasa saya letakkan di sini, dan saya tulis di sini 26 haribulan 8 2010. Ok, bermakna, sticker ini tidak boleh diganggu.
Q73:	Tidak boleh diganggu kan?
A:	Ya sebab sticker di sini pun ada menerangkan tentang akta-akta di sini lah. Ada keterangan di sticker ini.
Q74:	Jadi adakah betul bahawa setelah setiap pemeriksaan terdapat satu sticker sebegini dilekatkan pada bahagian TTB dan ada tulisan tarikh pemeriksaan.
A:	Boleh ulang balik?
Q75:	Adakah lazimnya setelah setiap pemeriksaan, satu sticker sebegini dilekatkan pada TTB tersebut dengan tarikh pemeriksaan ditulis pada sticker tersebut?
A:	Setiap kali kita orang periksa, sticker ini digunakan untuk kes kecurian arus sahaja.
Q76:	Oh kecurian arus.
A:	Ya.
Q77:	Then fungsi sticker ini? Adakah untuk menghalang clamp daripada dimasukkan?
A:	Ya.

Q78: Untuk penjelasan saya sendiri, jadi jika terdapat kemasukkan clamp melalui sticker ini, then Tenaga akan tahu bahawa sticker ini telah diganggu kerana clamp telah dimasukkan dan memecahkan sticker tersebut. Betul tak? Di belakang sticker ini ada satu lubang kan?

A: Ya, betul.

Q79: Dan clamp dimasukkan melalui lubang tersebut kan?

A: Ya.

Q80: Clamp dimasukkan melalui lubang tersebut jadi sticker ini adalah untuk menghalang clamp daripada dimasukkan. Jika mereka masukkan clamp dan keluarkan balik, then terdapat satu lubangkan pada pelekat.

A: Sticker ini akan koyak.

Q81: Ah. Akan koyaklah.

A: Akan koyak.

Q82: Jadi jika anak guam saya ingin memasukkan clamp semula, lain kali bila Tenaga masuk buat pemeriksaan, Tenaga boleh nampak sticker sudah koyakkan kerana clamp telah dimasukkan. So, sticker adalah untuk menghalang Defendan daripada memasukkan clamp, betul?

A: Ya.

[42] PW1's evidence *during re-examination* was that if there was indeed any tampering with the meter there would be traces of that which could be detected by the plaintiff's officers/servants:

Q23: Tadi peguam ada tanya Encik Nazmi, berkenaan dengan sticker. Soalan saya, boleh tak clamp ini dimasukkan tanpa mengganggu sticker

A: Boleh juga. Dia akan buka perlahan-lahan, ataupun buka slow. Memang boleh dan dia akan selit di ...

Q24: Boleh buka sticker itu perlahan-lahan ...

A: Ya.

Q25: Dan masukkan...

A: *Tetapi dia akan ada kesan lah. Kita akan nampak kesan bukaan itu di hujung sticker itu. Memang akan nampak kesan bukaan dan kesan tutup balik. Di situlah kita akan tahu*. (Emphasis added.)

[43] In other words, any removal and re-affixing of the sticker would be detectable. Yet there was no evidence led to show any sign of the removal and affixing of the sticker on the meter during previous inspections after the sticker had been fixed onto the meter.

[44] It was no surprise therefore that the learned judicial commissioner did not accept the amount stated in the written statement as loss of revenue prior to 1 June 2010.

[45] It was also obvious, from the learned judicial commissioner's decision not to accept the amount in the written statement as *prima facie* evidence of the plaintiff's loss of revenue, that the learned judicial commissioner had tacitly accepted, despite the strong words used in the written judgment, the defendant's explanation on the differences in the usage of electricity in the period for which loss of revenue was claimed by the plaintiff.

[46] We had closely examined the evidence of the plaintiff's witnesses.

[47] It was manifestly clear that there was no sound basis used for the back billing. PW2, for example, claimed that the defendant could 'control' electricity usage, but he clearly could only make a bare denial when asked if the difference in the readings could be the result of less paddles being used. PW2 admitted that they did not check the number of paddles being used and had no authority to inspect electrical appliances used at the premises.

[48] PW2 was shown a photograph that showed the readings were lower after the 'irregularities' were normalised. He was asked why that could be so. PW2's explanation was that when the inspection was commenced, the load was high because there could be a lot of paddles being used. When the inspection was almost over, 'berkemungkinan' (probably) the workers had switched off one of the paddles, thus causing the reading to drop. We found many other similar instances in the evidence of the plaintiff's witnesses of 'guesswork' being used as a basis for the back billing.

[49] In our considered view, when the business activity of a consumer involves possibilities of different levels of electricity usage at different periods of time, it would be gross injustice to automatically assume that any drop in electricity usage was the result of electricity 'theft'.

Loss of revenue — expenses of the pre-dawn inspection

[50] The amount claimed in the written statement also included the expenses incurred by the plaintiff in conducting the pre-dawn inspection, including overtime charges and other expenses.

[51] PW3 either admitted that the amounts claimed in the statement for overtime payments to the officers of the plaintiff were inaccurately calculated or remained silent when it was shown to her that the calculations were inaccurate.

[52] Apart from the inaccuracies in the calculations of the overtime, learned counsel for the defendant attempted to ask the plaintiff's witnesses questions as to the reasonableness of conducting the inspection at 5am. However, those questions were disallowed by the learned judicial commissioner who directed that the issue be dealt with in submissions.

[53] It was not in dispute that the entry into the defendant's premises was done without a warrant from a magistrate. It was also clear that the police officers who were present were auxiliary policemen who were there only to ensure the safety of the team. None of them was of the rank of Inspector or above.

[54] The plaintiff claimed that it had a right to conduct such predawn inspection by virtue of reg 7 of the Licensee Supply Regulations 1990, which reads as follows:

> 7 Any officer authorized by a licensee may at all reasonable times, on the production of any duly authenticated document showing his authority, enter any premises to which a supply of electricity is being given by the licensee, or by another licensee (wholly or partly) through the first-mentioned licensee's supply lines and electrical equipment, for any of the following purposes, namely:
>
> (a) inspecting any supply line or electrical equipment belonging to the licensee;
>
> (b) ascertaining the register of any electricity meter; or
>
> (c) removing inspecting or re-installing any electricity meter or installing any substitute meter.

[55] The plaintiff was a licensee under Act 447. It was neither a regulator not an enforcer. Its relationship with its customers was based on contract. Apart from the contractual rights, it was given permission (not power) to do certain acts consistent with its role as an electricity supply provider, such as the ability, under reg 7 as quoted above, to enter premises to which supply is given by it, 'at all reasonable times'.

[56] The learned judicial commissioner in his written judgment had the following to say:

> ... If I were to accept the defendant's argument that inspection cannot be done at 5am, then any meter tempering [sic] during these hours, which the defendant considers unreasonable, will be beyond the reaches of the Plaintiff and the law. Surely, this court cannot restrict the rights of the Plaintiff to carry out inspection of its meter panels during late night or early morning hours. The inspections by the Plaintiff and the reasonableness of its officers' conduct must be examined and construed on a case by case basis. In this regard, I do not find the conduct of the investigation to be anything but proper ...

[57] While we did not disagree that reasonableness was subjective and must be construed on a case by case basis, we were of the considered view that entry into a consumer's premises in the wee hours of the morning when no operational activity was going on was clearly not entry at a reasonable time. PW2 in fact used the term 'ambush' to describe the pre-dawn inspection. An 'ambush' is the domain of enforcement officers — which PW1 and PW2 and their men were not. This was not a factory where operations might be conducted throughout the day and at night.

[58] Regulation 7 as it was at the material time did not, and was clearly not intended to, permit any activity of enforcement or 'ambush'. It merely authorised an officer of a licensee to enter a consumer's premises to do *only* the following three acts:

(a) to inspect any supply line or electrical equipment belonging to the licensee;

(b) to ascertain the reading registered by any electricity meter installed in the premises; and

(c) to remove, inspect or re-install any electricity meter or to install a substitute meter.

[59] Enforcement functions, such as the detection of the commission of offences under Act 447, including offences under s 37, have been expressly conferred by the Act on the persons clearly set out in the Act. These persons *do not* include officers of a licensee or officers authorised by a licensee. This must be so as *a licensee is itself liable to have the penal provisions of the Act enforced against it*, as can be seen, for example, from the provisions of sub-ss 37(6) and 36(7) of the Act.

[60] Section 4A of Act 447 empowers the Minister to authorise 'any public officer or officer of the Commission' to exercise the powers of enforcement under the Act. These authorised officers and police officers not below the rank of Inspector are *the only persons* who are authorised by the Act to perform enforcement functions.

[61] Subsection 5(2) of Act 447 makes it clear that for entry into premises other than at a reasonable time, *even* by these enforcement officers, a warrant issued by a magistrate is required. The *only* exception to the requirement for a warrant is when the enforcement officer 'has reasonable grounds for believing that by reason of delay in obtaining a search warrant, any article, thing, book, document, installation or part thereof used to commit or to be used to commit an offence under this Act is likely to be removed or destroyed'.

[62] In our considered view, given the clear provisions of Act 447 on powers of enforcement and persons who can exercise such powers of enforcement, reg 7, being subsidiary legislation, could not possibly be interpreted to allow officers authorised by a licensee to conduct, as stated by PW2, a pre-dawn 'ambush' of the defendant's premises.

[63] We must add that the case of *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* referred to us by the plaintiff dealt with the right of a licensee to disconnect electricity supply to a consumer's premises. It did not deal with the issue of reg 7.

[64] As the pre-dawn inspection by the plaintiff's officers was clearly not permitted by the Act, any claim for expenses in the form of their overtime charges and other expenses involved in conducting the inspection would be, in our considered view, contrary to the intention of Act 447 and *ultra vires* the Act.

[65] In the circumstances, as the overtime charges and other expenses for the pre-dawn inspection were included in the total amount claimed in the written statement, we were of the considered view that the learned judicial commissioner was correct in not accepting the written statement as *prima facie* evidence of the amount that had to be paid by the defendant.

Conclusion

[66] Having examined the pleadings and the witness statements and notes of proceedings, it was clear to us that the plaintiff was relying solely on the written statement as the basis of its claim. When the learned judicial commissioner (correctly, in our view) impliedly rejected that written statement, the basis for the plaintiff's claim failed.

[67] Hence, the order made for damages to be assessed and the order for aggravated damages were without basis and must be set aside.

DECISION

[68] Based on the analysis set out above:

(a) we allowed the defendant's cross-appeal to the extent that it related to the plaintiff's claim and set aside the High Court order on general damages and aggravated damages;

(b) we dismissed the plaintiff's appeal; and

A (c) we dismissed the defendant's cross-appeal against the dismissal of its counterclaim.

[69] We ordered costs of RM10,000 to be paid to the defendant, and ordered the deposit to be refunded to the plaintiff.

B

Defendant's cross-appeal allowed in part; order of High Court on general damages and aggravated damages set aside; dismissing plaintiff's appeal; and defendant's cross-appeal against dismissal of counterclaim dismissed.

C

Reported by Afiq Mohamad

D

E

F

G

H

I